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Supreme Court, U.S.
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No. 91-1667

In The

Supreme Court of the United States

October Term, 1991

CENTRA, a Delaware Corporation, GENERAL HIGHWAY EXPRESS, an Ohio Corporation, CENTRAL TRANSPORT, a Michigan Corporation, GLS LEASCO, a Michigan Corporation, CENTRAL CARTAGE, a Michigan Corporation, and MASON AND DIXON TANK LINES, a Tennessee Corporation,

Petitioners,

vs.

CLIFTON McDONALD, HERMANN V. MYERS, SR., WILLIAM G. McINTYRE and DANIEL L. SANDY, in their capacities as trustees of and on behalf of the FREIGHT DRIVERS AND HELPERS LOCAL UNION NO. 557 PENSION FUND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a pension plan's act of filing a proof of claim in a withdrawing employer's Chapter 11 case equitably tolls the time with which members of the withdrawing employer's controlled group, who are not debtors in the Chapter 11 case, must demand arbitration under the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 4221(a)?

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OPINIONS BELOW

In addition to the opinion and order cited by petitioners, the opinion of the United States District Court for the District of Maryland is reported at 188 B.R. 903.

STATEMENT OF THE CASE

Despite earlier correspondence and inquiries by the Pension Fund, Mason & Dixon failed to notify the Pension Fund of its Chapter 11 filing, and the Pension Fund did not learn of the filing until November 26, 1984, well after the bar date for proofs of claim (R. 52, 67, 165-169). The Pension Fund responded by sending to Mason & Dixon a notice and demand for payent of withdrawal liability on January 11, 1985, identifying March, 1984 as the date of withdrawal (R. 48-50). The Pension Fund also filed a roof of claim in the Chapter 11 proceedings, in an effort to protect its rights against the debtor, Mason & Dixon (R. 141-143).

On March 29, 1986 Mason & Dixon's plan of reorganization was confirmed, although the Pension Fund was never notified of the filing of the plan, was never given an oportunity to review the dislosure statement, and received no solicitation to vote on the proposed plan (R. 51-53).

In 1987, during discovery and settlement discussions (both initiated by Central Transport and GLS) on the objections to the Pension Fund's proof of claim, and well after the statutory period to request review and initiate arbitration had passed, the Pension Fund learned that although Mason & Dixon's general commodities division had completely ceased operations within the jurisdiction of the Pension Fund in 1984, the company's special commodities division had continued to operate within the jurisdiction, albeit with only a single employee. The Fund voluntarily undertook to review the January, 1985 assessment and found that there was

a partial rather than a complete withdrawal (R. 153-154). The Pension Fund voluntarily reduced the assessment from $619,101 to $401,960 (R. 8).

In May, 1989 the objections to the Pension Fund's proof of claim were still pending in Mason & Dixon's Chapter 11 proceedings. The Pension Fund had by then learned of the existence of solvent control group members and had learned that Mason & Dixon's plan of reorganization provided for payment of withdrawal liability claims in non-voting stock that could not be redeemed for 20 years. On June 6, 1989 the Pension Fund moved for permission to withdraw its proof of claim (R. 157-173), choosing to seek payment from the solvent control group members.

At no time did the Pension Fund state any intention to look only to Mason & Dixon for satisfaction of the withdrawal liability claim, nor did the Pension Fund waive any rights against any other entities.

SUMMARY OF ARGUMENT

There is no conflict between the Fourth Circuit's opinion in this case and the decision of the Seventh Circuit in *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transport, Inc.*, 888 F.2d 1161 (7th Cir. 1989), because the Seventh Circuit has narrowed the holding in its case and has severely limited the future applicability of the decision. Moreover, petitioners have failed to establish any factual basis for their appeal to equity.

There is no conflict between the Fourth Circuit's opinion in this case and the decision of the Sixth Circuit in the Tennessee litigation, because that case considered the question of control group membership as of December 31, 1983 and made no holding on the issue of control group membership as of March, 1984,

the date in question in this case. Further, and more importantly, the decision in this case turns on the control group's failure to arbitrate the issue of control group membership, which failure bars litigation of the issue. Finally, in the District Court the petitioners failed to raise a genuine issue of material fact as to any withdrawal date prior to March 30, 1986.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE FOURTH AND SEVENTH CIRCUITS AS TO THE AVAILABILITY OF EQUITABLE TOLLING.

A. The Seventh Circuit Has Narrowed Its Position.

The Fourth Circuit held that the doctrine of equitable tolling was not available to the petitioners, *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1064 (4th Cir. 1991), because the doctrine is in conflict with the purposes of the time limitation imposed on arbitration requests under MPPAA, *id.* at 1064-65. Petitioners argue that the Fourth Circuit's holding is in conflict with the Seventh Circuit's opinion in *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transport, Inc.*, 888 F.2d 1161 (7th Cir. 1989), which held the arbitration time limit equitably tolled. Petitioners neglect to point out, however, that the Seventh Circuit has questioned and narrowed significantly its opinion in *Central Transport*.

In *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992), the Seventh Circuit considered the defendant's argument that the time limit for demanding arbitration had been equitably tolled, and rejected the

argument, after reviewing its holdings in *Banner Industries, Inc. v. Central States, Southeast & Southwest Areas Pension Fund,* 875 F.2d 1285 (7th Cir. 1989) and in *Central Transport.* The court stated that "[b]oth decisions can be questioned, given Congress' evident desire that challenges to withdrawal liability be resolved quickly, given that the employer could pursue his judicial and arbitral remedies simultaneously . . . and given, therefore, that it would not have been infeasible for the employer to commence arbitration." 956 F.2d 1369, 1377. The court went on to state that it read the two opinions "narrowly," and that "[t]he two cases should probably be regarded as transitional decisions in which uncertainties about the law made judges hesitate to penalize litigants for having made questionable procedural choices." *Id.* In short, taking into consideration the purposes underlying MPPAA's arbitration requirement and the time limit imposed on a defendant's right to demand arbitration, the Seventh Circuit's position is that equitable tolling will no longer be available to a MPPAA defendant, absent the most compelling circumstances. That position comports with the Fourth Circuit's holding in this case.

B. Petitioners Have Not Established A Factual Basis For Their Appeal To Equity.

Even if the doctrine of equitable tolling were available in an appropriate MPPAA case, this is not that case. Here the defendants assert in support of their position that the Pension Fund "chose" to litigate the withdrawal liability assessment in the Mason & Dixon bankruptcy proceedings, and that no notice was given that the Pension Fund might attempt collection from solvent control group members.

The Pension Fund did not "choose" the bankruptcy court as a forum. Upon learning (some nine months after the fact) that Mason & Dixon had filed a Chapter 11 petition, the Pension Fund

took the only action that any prudent creditor would take: it filed a proof of claim in the bankruptcy proceedings, in an effort to protect its rights. That filing hardly represents a choice of forum, and carries no implication that the Pension Fund would forego other sources of payment, if available.

Nor was it reasonable for the petitioners to rely on the pendency of Mason & Dixon's Chaper 11 proceeding to resolve claims against non-debtors such as themselves. They cite three cases for the proposition that the bankruptcy court is an appropriate forum for resolution of withdrawal liability disputes and that resort to arbitration is not necessary: *In re T.D.M.A., Inc.*, 66 B.R. 922 (Bankr. E.D. Pa. 1986), *In re Amalgamated Foods, Inc.*, 41 B.R. 616 (Bankr. C.D. Cal. 1984), and *In re Cott Corp.*, 26 B.R. 332 (Bankr. D. Conn. 1982). Each of those cases involved only the question of whether the bankruptcy court was an appropriate forum for the *debtor* to use to resolve a withdrawal liability dispute; they did not address the question of whether the bankruptcy court is an appropriate forum for solvent control group members (who are outside the jurisdiction of the bankruptcy court) to contest an assessment of withdrawal liability. The protection afforded to the debtor by the filing of a petition in bankruptcy does not inure to the benefit of non-debtor entities. *I.A.M. National Pension Fund v. Slyman Industries*, 901 F.2d 127, 129 (D.C. Cir. 1990); *Mason & Dixon Tank Lines v. Central States, Southeast & Southwest Areas Pension Fund*, 852 F.2d 156, 163 (6th Cir. 1988).

Therefore, it was unreasonable for petitioners to expect that *their* control group liability could be affected by Mason & Dixon's Chapter 11 filing, and they have failed to show any factual basis for their appeal to equity. As the District Court stated:

> [I]t has been five years since the Defendants withdrew from the pension plan, and it is clear

> that they have done everything possible to avoid their contractual obligation. They have neither paid the scheduled monthly payments due the plan nor had they ever requested arbitration until this suit was filed. It is a well settled maxim of equity that "[o]ne who fails to act diligently cannot invoke equitable principles to excuse the lack of diligence." [Citations omitted.] Moreover, the factual circumstances surrounding the misleading of the Fund as to their affiliate status, as well as their rather sophistic arguments to this Court, lead this Court to find that the defendants shall find no refuge in equity, nor shall they evade their obligations any longer.

McDonald v. Centra, 118 B.R. 903, 931 (D. Md. 1990).

II.

THERE IS NO CONFLICT BETWEEN THE FOURTH AND SIXTH CIRCUITS ON THE ISSUE OF CONTROL GROUP MEMBERSHIP ON THE RELEVANT DATE.

Petitioners also assert that the Fourth Circuit holding is in conflict with a ruling by the Sixth Circuit in the Tennessee Litigation, which found that they were not members of Mason & Dixon's control group until February, 1985. There is, however, no conflict, as the cases dealt with different issues.

The issue considered by the Fourth Circuit was whether petitioners' failure to initiate arbitration within the statutory period barred them from asserting a defense (*i.e.* control group membership) that could and should have been raised in arbitration. On the other hand, the Sixth Circuit case arose in the procedural context of an effort by members of the control group to obtain

an injunction against collection of withdrawal liability. The court addressed the merits of the case and, in that context, considered the question of control group membership as of *December 31, 1983. Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 639 F. Supp. 788, 790 (E.D. Tenn. 1986); *Central Transport v. Central States, Southeast and Southwest Areas Pension Fund*, 640 F. Supp. 56, 57, 60 (E.D. Tenn. 1986). The Tennessee Litigation made no holding on the question on the question of control group membership as of March, 1984, the date in issue in this case.

Finally, even if petitioners should have been allowed to raise the issue of control group membership in the District Court without having submitted it to arbitration, they failed to raise any genuine issue of material fact on that point. Specifically, the *only* evidence offered by petitioners on the question was a single affidavit, which stated only that Central Transport, Inc. owned none of the stock of Mason & Dixon on or after March 30, 1986 (R. 236-237). In that the Fund assessed withdrawal liability based on a withdrawal in March, 1984, an affidavit that speaks to March 30, 1986 and after is insufficient to raise a genuine issue of material fact.

Therefore, a finding of the Sixth Circuit as to petitioners' control group membership, based on other evidence and in considering other issues, is not in conflict with the holding of the Fourth Circuit in this case.

CONCLUSION

The opinion of the Fourth Circuit is not in conflict with either the Sixth or the Seventh Circuits. Therefore, no writ of certiorari should be issued.

Respectfully submitted,

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